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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 934

WILLIAM L. BABB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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Petitioner, William L. Babb, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 27, 1958.

Citations of Opinions Below

The District Court did not write or file an opinion. The opinion of the Court of Appeals, printed in Appendix "B" hereto, infra pp. 29-45, has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered February 25, 1958 (R. 617, p. 45 infra; opinion R. 602-616, pp. 29-45, infra). A timely petition for rehearing filed on March 14, 1958 (R. 618) was denied on March 27, 1958 (R. 635, p. 46, infra). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), and Supreme Court Rule 22(2).

Questions Presented

1. Whether a conviction of the petitioner may be sustained for an offense charged under 18 U. S. C. 545, for concealing and facilitating the transportation and concealment of Charolaise cattle knowing the same to have been imported contrary to law, where the law contrary to which the cattle were alleged to have been imported was 19 U. S. C. 1484, providing for an entry of such cattle to be made by the consignee, when there is no penalty, civil or criminal, provided by any statute or regulation for failure to make such entry.

It is petitioner's position that the words "contrary to law" as used in 18 U. S. C. 545, mean contrary to some statute or regulation other than Sec. 545 *(Keck v. United States, 172 U. S. 434)* for the violation of which a civil or criminal penalty is provided *(United States v. Eaton, 144 U. S. 677; United States v. Grimaud, 220 U. S. 506)*. There is no civil or criminal penalty provided by any statute or regulation for the failure to make the entry provided for in 19 U. S. C. 1484.

2. Whether the word "consignee" as used in 19 U. S. C. 1484, and in the relevant counts of the indictment means a person defined as consignee in 19 U. S. C. 1484 (Statute printed p. 23 infra), and whether petitioner who under the evidence and theory of the government in this case was merely looking after, guarding, and helping in transporting the cattle to Louisiana, was a consignee as used in 19 U. S. C. 1484, and as defined in 19 U. S. C. 1483.

It is petitioner's contention that, under the undisputed evidence and the government's theory of the case, he was not a consignee.

3. Whether 19 U. S. C. 1484 providing for an entry to be made by a consignee of merchandise applies to merchandise, as the Charolaise cattle in this case, where there is no evidence that the cattle were imported by "vessel or vehicle" or "transported in bond"; such statute being limited by its terms to such means of importation.

It is the petitioner's contention that 19 U. S. C. 1484 has no application to a consignee of merchandise imported "otherwise than in a vessel or vehicle", and that the requirement as to merchandise so imported "otherwise than in a vessel or vehicle" is covered by 19 U. S. C. 1459.

4. Whether, under the prosecution in this case for violation of 18 U. S. C. 545, the defendant was entitled to a charge in effect "that the jury must find that the defendant actually knew the provisions of the specific law contrary to which it is alleged that the cattle were imported."

It is petitioner's position that, in an offense of this kind for concealing and facilitating the concealment

and transportation of cattle knowing the same to have been imported contrary to law, in that defendant was the consignee of the cattle and did not make an entry thereof, in order to find the specific criminal intent, the jury must, in addition to concealment and transportation, find that defendant knew there was a statute or law making him consignee of the cattle, and that under that law he was required to make an entry.

Where a defendant is charged with an innocent act such as "concealment" and "transportation" of cattle, which becomes criminal only because of the knowledge by defendant of some other and prior unlawful act in connection with said cattle concealed and transported, in order to establish defendant's criminal intent in the otherwise innocent act of "concealment" and "transportation", it must be shown that the defendant knew of the law and the terms thereof which made the importation of such cattle "contrary to law".

Particularly is this true when the unlawfulness of the importation depended upon the failure of the defendant to perform, after he came into possession of said cattle, some duty imposed upon him by the customs laws and regulations.

Statutes Involved

The statutory provisions involved are:

(1) 18 U. S. C. 545, making it an offense to fraudulently or knowingly conceal or in any manner facilitate the transportation and concealment of mer-

chandise after importation, knowing the same to have been imported and brought into the United States contrary to law. (The statute is printed, p. 19 infra).

This case involves the construction of the words "contrary to law".

(2) 19 U. S. C. 1459, providing that any person importing merchandise "otherwise than in a vessel or vehicle" shall immediately make report thereof to nearest custom office. (The statute is printed, p. 20 infra).

(3) 19 U. S. C. 1460, providing a penalty for the violation of 19 U. S. C. 1459. (The statute is printed p. 21 infra).

(4) 19 U. S. C. 1401(a) and (b), defines "vessel" and "vehicle". (The statute is printed, p. 22 infra).

(5) 19 U. S. C. 1483, defining the word "consignee" for all purposes of the subtitle. (The statute printed, p. 22 infra).

(6) 19 U. S. C. 1484, providing for entry to be made by consignee, and generally for procedure to be followed in case of importation by "vessel" or "vehicle". (The statute printed, p. 23 infra).

(7) 18 U. S. C., Chap. 27, containing criminal penalties for the violation of the custom laws. These sections are not printed because of length. An examination reveals that the penalties provided are confined to fraudulent or false entries, and smuggling, and other acts of fraud. In none of these is the failure to make an entry of merchandise by a consignee made a criminal offense, nor is any penalty prescribed therefor.

(8) 19 U. S. C., Section 1431 to 1466, except as indicated above are not printed because of length, but all have to do with imported merchandise, and the report, inspection, and entry and unlading.

(9) 19 U. S. C., Sections 1481 to 1527, except as indicated above, are not printed because of length. but all have to do with the ascertainment and collection of duties on imported merchandise.

Statement

(The material portions of the indictment are printed in Appendix "C", p. 47, infra).

This case involves alleged offenses growing out of the transportation of certain Charolaise cattle sold and shipped by one Antonio Gilly from the Republic of Mexico and purchased by a Mr. Broussard and delivered to and received by Broussard at his ranch in Kaplan, Louisiana. (R. 269-280).

There was no evidence as to how the cattle were imported, the only evidence being from the truck driver, Gibson, that they were driven to the pen at defendant's ranch by some Mexicans.

The indictment alleges that they were imported "otherwise than in a vessel or vehicle". (R. 7-12).

All the cattle involved in counts five, six, seven, eight, and nine, being the counts for which defendant was convicted, were transported to Louisiana to Mr. Broussard from defendant's ranch by the witness Orval Gibson, who was a truck driver for a public carrier. Defendant accompanied the cattle on the truck guarding and looking after the cattle. (R. 105-132).

Mr. Broussard did not testify in the case.

If the defendant was the consignee of the cattle, it was because they were delivered to his ranch, and he, and the truck driver for the carrier, loaded them on the truck and delivered them to Louisiana.

Defendant was indicted under nine counts (R. 2-12): Count 1 charged a conspiracy which was dismissed by the district court (R. 538); on Counts 2, 3 and 4, the district court instructed a verdict of acquittal. (R. 539).

Defendant was convicted of five indentical counts, except as to different dates and different cattle, charging in substance that defendant fraudulently and knowingly concealed and facilitated the transportation and concealment of certain Charolaise cattle, knowing the same to have been theretofore imported and brought into the United States contrary to law. (Count 5 of Indictment printed under Exhibit C, p. 47 infra).

Under the indictment as presented, the importation was alleged to be in violation of 19 U. S. C. 1459 (importing otherwise than in a vessel or vehicle and failure to make immediate report to nearest custom officer); and in violation of 19 U. S. C. 1484, in that defendant was consignee of the cattle, and failed to make an entry in person or by an agent authorized in writing under prescribed regulations.

However, on the trial before the case was submitted to the jury, the trial court required the government to elect whether it would rely for conviction upon Sec. 1459 or upon Sec. 1484, Title 19, (R. 492-493; opinion of Court of Appeals, R. 604, also p. 29 infra).

The government abandoned the allegations under Sec. 1459, and went to trial under Sec. 1484, on the theory that defendant was consignee of said cattle and failed to make an entry as provided by the statute.

Defendant made a motion for instructed verdict on the ground that he was not a consignee and the cattle were not imported contrary to law. (R. 283-286); and renewed the motion at the end of all the testimony (R. 483); and the motions were overruled (R. 286 and 483).

The district court charged the jury in effect that anyone who received the cattle, with guilty knowledge that an entry had not been made, was consignee (R. 497) The defendant requested charges predicated upon the statutory deiniton under 19 U. S. C. 1483 (R. 531-533), which were refused.

The relevant portions of the Record are printed in Exhibit C hereto, pp. 47-56, infra.

The defendant also requested a charge with reference to the necessity for the jury to find that defendant had specific knowledge of the statute contrary to which it was alleged the cattle were imported. Defendant duly made objection to the charge on this ground (R. 488). (The Court's charge, which was objected to, appears in the Record at pp. 497-498).

The relevant portions of the Record are printed in Exhibit C. hereto, pp. 47-56, infra.

Reasons for Granting the Writ

1. In holding that the words "contrary to law" as used in 18 U. S. C. 545, include the violation of

any statute, rule, or regulation in connection with customs and importation of goods into the United States, regardless of whether there is a penalty, civil or criminal, provided for such violation, the Court of Appeals in this case is in conflict with the opinion of the Supreme Court in *United States v. Eaton, 144 U. S. 677;* which case was explained, illustrated, and approved in *United States v. Grimaud, 220 U. S. 506.*

The decision also is in effect in conflict with *Keck v. United States, 172 U. S. 434,* holding that under (R. S. U. S., Sec. 3082, now 18 U. S. C. 545) it is necessary to allege in the indictment importation to be contrary to some law other than Sec. 3082 (545) itself.

The holding in the instant case is also in conflict with the opinion of the Court of Appeals (then the Circuit Court of Appeals) for the Eighth Circuit in *Estes v. U. S., (8th Cir.) 142 C. C. A. 342, 227 F. 818;* and the Court of Appeals in the instant case refused to follow the holding of its own Court in its former opinion *Goldman v. U. S., (5th Cir.) 263 F. 340.*

The *Estes case,* supra, by the Eighth Circuit was a case almost identical with our instant case. The indictment was brought under the same statute, R. S. U. S., Section 3082 (now 18 U. S. C. 545 under which our indictment is drawn).

That case *(Estes)* relying upon *Eaton* and *Grimaud,* both by the Supreme Court, held that the words "contrary to law" as used in Sec. 3082, R. S. U. S., (Sec. 545), meant a law or regulation for which a penalty was provided.

And in *Goldman v. U. S., (5th Cir.) 263 F. 340*, the Fifth Circuit Court of Appeals, itself, held, with reference to Sec. 3082, (18 U. S. C. 545) as follows:

"It is necessary not only to establish them (custom regulations), but to make disobedience of them criminal."

And the same opinion proceeds:

" 'Contrary to law' we construe to mean to be in violation of any regulation, relating to its (merchandise) introduction, established by law (other than section 3082 itself) and made punishable when disobeyed."

The indictment in our instant case as originally presented alleged that the importation was contrary to 19 U. S. C. 1459 and also contrary to 19 U. S. C. 1484.

This indictment was drawn as a result of the reversal by a former appeal by this defendant growing out of the same facts. The previous indictment did not allege the law contrary to which the cattle were imported, and the Court of Appeals, following the *Keck case*, (172 U. S. 434) reversed and dismissed the indictment in *Babb v. United States, (5th Cir.) 218 F. (2) 538;* which cites with approval both *Estes* from the Eighth Circuit and *Goldman* from the Fifth Circuit.

In redrawing the indictment the government properly alleged a violation of *19 U. S. C. 1459* as "contrary to law", there being a penalty for such violation prescribed by *19 U. S. C. 1460.*

But there is no penalty prescribed for the failure to comply with 19 U. S. C. 1484 and to make an entry.

When the government was unable to prove a violation of 19 U. S. C. 1459, and abandoned that portion of the counts, only the allegation as to 19 U. S. C. 1484 remained; and this did not allege an importation "contrary to law", because the failure to comply with 19 U. S. C. 1484 carries no penalty.

It is no answer to say as the Court of Appeals says in this instant case (p. 38, infra) that "18 U. S. C. 545 (R. S. 3082) carries its own penalty". That is not enough. The law contrary to which the cattle were imported must be some other statute carrying a penalty "other than Section 3082 (18 U. S. C. 545) itself".

This case involves an important and serious question in the administration of the criminal laws of the United States. If the opinion in the instant case is permitted to stand, then the defendant will stand convicted as a felon for concealing and transporting cattle, an innocent act, because he knew that an entry of the cattle had not been made, when the failure to make the entry was also an innocent act, for which no penalty, civil or criminal, was provided.

It would seem an intolerable construction of the law, and the words "contrary to law", to hold that a man may be convicted of a felony for transporting cattle, with the knowledge that all the mere directory (non mandatory) provisions and regulations connected with the customs service had not been performed. No such intention should be imputed to the Congress in the use of the words "contrary to law".

2. *The exact question of the meaning of the word "consignee" as used in 19 U. S. C. 1484 has never been decided by the Supreme Court or any Court of Appeals prior to the instant case.*

The question involves a serious question as to the administration of the criminal laws of the United States, and the Supreme Court, in this case of first impression, should establish a rule for the guidance of the courts of the United States in enforcing criminal sanctions in the administration of the customs laws.

The evidence is undisputed that the cattle were hauled by a trucking carrier employed by Mr. Broussard, and that they were picked up by the carrier at defendant's ranch. Defendant went along and looked after the cattle and guarded them. Defendant did not haul them, but they were hauled by the witness, Gibson. Defendant had nothing to do with hiring Gibson or the truck.

The evidence is undisputed that Mr. Broussard was the owner and consignee of the cattle. They were imported by him and shipped to him from Mexico by Gilly. There is only one consignee of imported merchandise, and in this case he was Broussard.

The statute 19 U. S. C. 1483, makes the person named in a bill of lading the consignee, or the holder of an endorsed bill, the consignee of the goods.

If there is no bill of lading, then the person to whom the goods are shipped is the consignee.

Under the district court's charge (p. 54, infra), the jury could find defendant the consignee. He defined the consignee as the person to whom the merchandise "was to be delivered". Whether the word

"consignee" is used in a technical sense (as defined by the statute), or in an ordinary sense, a person who is hired to look after and guard cattle which are imported, is not a consignee.

It is the owner of the goods that are imported, who is the consignee and owes the duty of making the entry. The Supreme Court so holds in *Harris v. Dennie, 28 U. S. (Pet.) 292* and *Waring v. Mayor of Mobile, 75 U. S. (8 Wall.) 110.*

Two persons are liable for making entries: (1) the owner; and (2) the consignee. See: *U. S. v. Wells Fargo & Co., 271 F. 180, 182.* The consignee is the consignee as defined by the statute (19 U. S. C. 1483). If there is no bill of lading, then the owner is the consignee and must make an entry.

"A reasonable construction upon the law and definition of 'consignee'" should be placed by the Supreme Court. See: *U. S. v. William H. Masson, Inc., 33 F. Supp. 874.*

The Supreme Court should point out that tariff duties imposed by the statute are assessed against the owner of imported merchandise, and that there is no liability against a consignee as such.

3. *The Supreme Court should consider and decide the question of first impression presented by this instant case as to whether 19 U. S. C. 1481 providing for entry of merchandise by a consignee is limited to merchandise imported into this country by "vessel" or "vehicle".* The statute by its terms (p. 23, infra) is so expressly limited.

Prior to the amendments to the Customs Act of 1930, by Act of June 25, 1938, the provisions of the

Act with respect to imported merchandise, and the report, inspection, and entry, and unlading were contained in 19 U. S. C., Sections 1431 to 1466, and the ascertainment and collection of duties were in Sections 1481 to 1527.

An examination of these statutes shows that they had to do with administrative matters and applied solely to importations by "vessel" or by "vehicle".

What was meant by "vehicle" is well understood. See: *U. S. v. Myers, 99 Ct. Cl. 158*, and connected cases, modified on other grounds *320 U. S. 561;* also *19 U. S. C., 1401 (a) and (b);* printed p. 22, infra.

On June 25, 1938, there were two material amendments to the statute. Prior to that date 19 U. S. C. 1459 and 1460, as well as 19 U. S. C. 1484, applied only to the master of a vessel and person in charge of a vehicle.

Both Sections 1459 and 1460 were amended to include any person importing merchandise "otherwise than in a vessel or vehicle".

19 U. S. C. 1484, providing for an entry to be made by a consignee of merchandise was not so amended and was left to apply only to merchandise imported by "vessel" or "vehicle".

The portion of 19 U. S. C. 1459 (as printed p. 20, infra) added in 1938, was that beginning, "Any person importing or bringing merchandise from a contiguous country otherwise than in a vessel or vehicle shall", and ending "shall present such merchandise to such custom officer for inspection".

If the Congress had intended to so amend 19 U. S. C. 1484, it would have done so either in 1938, when Secs. 1459 and 1460 were amended, or in 1953 when Section 1484 itself was amended in other respects.

In 19 U. S. C. 1484, in paragraphs (a) and (f) the word "consignee" is used in connection with "vessels" or "vehicles"; and in paragraph (f) it is so used three different times.

The reason that the statute is so limited is because it is dealing with a consignee (and not an importer as in Sec. 1459 and 1460), and consignee is universally used to imply a carriage, either in a "vessel" or "vehicle".

The whole theory of the government's case, as set forth in the indictment, as shown by the proof, was that the importation in this case was "otherwise than in a vessel or vehicle" (Indictment printed, p. 47, infra).

The Supreme Court, in order to establish a correct rule for the Courts of the United States, should hold that the provisions of 19 U. S. C. 1484 apply only to importations by "vessels" or "vehicles".

(4) The opinion of the Court of Appeals in this instant case is contrary to the opinion of the Court of Appeals for the Fourth Circuit in *Yarborough v. United States, (4th Cir.) 230 F. 2d 56;* and the Court of Appeals does not follow its own former opinion in *Hargrove v. United States, (5th Cir.) 67 F. 2d 820.*

The Supreme Court should decide this conflict on the question of when "ignorance of a duty imposed by law may negative wilfulness in failure to perform the duty."

The district court charged the jury as to the specific intent required to constitute the offense (See portion of the charge, p. 55, infra). The defendant requested a specific charge that the jury must find that the defendant actually knew the provisions of the specific law contrary to which it was alleged that the cattle were imported. (Objection and request printed, p. 56, infra).

That ignorance of the law is no excuse is a legal maxim known by every citizen sitting on a jury.

But there is an important exception, unknown to laymen and jurors, when ignorance of law excuses; and the defendant was entitled to have the jury told what the applicable exception here was.

Defendant in our instant case was not guilty unless he knew that under the law he was a consignee, and unless he also knew that if he did not make an entry, the cattle were imported in violation of the law.

The Court of Appeals cites but does not follow the rule announced in *Yarborough, 230 F. 2d 56*, and *Hargrove, 67 F. 2d 820;* and then cites but does not follow and apply the rule announced *1 Bishop on Criminal Law, 6th Ed., Sec. 297, p. 166*, and *1 Wharton on Criminal Law, 8th Ed., Sec. 85a, p. 113*

Probably the best statement of the rule is found in the most modern treatise on Criminal Law, by Rollins W. Perkins, of the University of California as follows:

"The maxim (ignorance of law no excuse) is held not to apply where specific intent is essential to a crime, and ignorance of law negatives existence of such intent." See: Perkins, Criminal Law, p. 816

(1957, the Foundation Press, Inc., Brooklyn).

Mr. Perkins cites *United States v. One Buick Coach Automobile, 34 F. 2d 218 (D. C. Ind. 1929).*

Where, as in our instant case, the defendant is criminally guilty of concealing and facilitating the transportation of the cattle only if he knew that the cattle were imported contrary to law, in that he was consignee and did not make an entry, then defendant was entitled to a charge that if he did not know about such a law, then he was not guilty.

The Supreme Court, in its supervision of the enforcement of the criminal laws of the United States, should lay down a rule which will protect defendants in their right to enjoy the benefit of the exception to the famous maxim.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

STATUTES CITED
(Material Portions)

(1) 18 U. S. C. 545.

§ 545. Smuggling goods into the United States.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $5,000.00 or imprisoned not more than two years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

(Note: The alleged acts of defendant occurred prior to the 1954 and 1955 amendments to the above section of the code.)

(2) 19 U. S. C. 1459

§ 1459. Contiguous countries; report and manifest.

The master of any vessel of less than five net tons carrying merchandise and the person in charge of any vehicle arriving in the United States from contiguous country, shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which such vessel or vehicle shall cross the boundary line or shall enter the territorial waters of the United States, and if such vessel or vehicle have on board any merchandise, shall produce to such customs officer a manifest as required by law, and no such vessel or vehicle shall proceed farther inland nor shall discharge or land any merchandise, passengers, or baggage without receiving a permit therefor from such customs officer. Any person importing or bringing merchandise into the United States from a contiguous country otherwise than in a vessel or vehicle shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which he shall cross the boundary line and shall present such merchandise to such customs officer for inspection.

(3) 19 U. S. C. 1460.

§ 1460. Same; penalties for failure to report or file manifest.

The master of any vessel or the person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 of this chapter, or if so reporting proceeds further inland without a permit from the proper customs officer, shall be subject to a penalty of $100 for each offense. If any merchandise is imported or brought into the United States in any vessel or vehicle, or by any person otherwise than in a vessel or vehicle, from a contiguous country, which vessel, vehicle, or merchandise is not so reported to the proper customs officers; or if the master of such vessel or the person in charge of such vehicle fails to file a manifest for the merchandise carried therein, or discharges or lands such merchandise without a permit; such merchandise and the vessel or vehicle, if any, in which it was imported or brought into the United States shall be subject to forfeiture; and the master of such vessel or the person in charge of such vehicle, or the person importing or bringing in merchandise otherwise than in a vessel or vehicle, shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported, or not included in the manifest, or which was discharged or landed without a permit. If any vessel or vehicle not so reported carries any passenger; or if any passenger is discharged or landed from any such vessel or vehicle before it is so reported, or after such report but without a permit; the master of the vessel or the person in charge of the vehicle

shall, in addition to any other penalty, be liable to a penalty of $500 for each passenger so carried, discharged, or landed.

(4) 19 U. S. C. 1401(a) and (b).

§ 1401. Miscellaneous.

When used in this subtitle or in Part I of Subtitle III—

(a) Vessel. The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

(b) Vehicle. The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used as a means of transportation on land, but does not include aircraft.

(5) 19 U. S. C. 1483.

§ 1483. Consignee as owner of merchandise.

For the purpose of this subtitle—

(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. The underwriters of abandoned merchandise and the salvors of merchandise saved from a wreck at sea or on or along a coast of the United States may be regarded as the consignees.

(2) A person making entry of merchandise under the provisions of subdivision (h) or (i) of section 1484 (relating to entry on carrier's certificate and on duplicate bill of lading, respectively) shall be deemed the sole consignee thereof.

(6) 19 U. S. C. 1484.

§ 1484. Entry of merchandise—Requirement and time.

(a) Except as provided in sections 1490, 1498, 1552, and 1553 and in subdivision (j) of section 1236 of this title, and in subdivision (h) and (i) of this section, the consignee of imported merchandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within five days, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time.

Production of Certified Invoice

(b) No merchandise shall be admitted to entry under the provisions of this section without the production of a certified invoice therefor, except that entry may be permitted if—

(1) The collector is satisfied that the failure to produce such invoice is due to causes beyond the control of the person making entry;

(2) Such person makes a verified declaration in writing that he is unable to produce such invoice and (A) files therewith a seller's or shipper's invoice, or (B) if he is not in possession of a seller's or shipper's invoice files therewith a statement of the value, or the price paid, in the form of an invoice; and

(3) Such person gives a bond for the production of such certified invoice within six months.

The Secretary of the Treasury shall provide by regulation for the production of a certified invoice with respect to such merchandise as he deems advisable and for the terms and conditions under which such merchandise may be permitted entry under the provisions of this section without the production of a certified invoice.

Production of Bill of Lading

(c) The consignee shall produce the bill of lading at the time of making entry, except that—

(1) If the collector is satisfied that no bill of lading has been issued, the shipping receipt or other evidence satisfactory to the collector may be accepted in lieu thereof;

(2) The collector is authorized to permit entry and to release merchandise from customs custody without the production of the bill of lading if the person making such entry gives a bond satisfactory to the collector, in a sum equal to not less than one and one-half times the invoice value of the merchandise, to produce such bill of lading, to relieve the collector of all liability, to indemnify the collect-

or against loss, to defend every action brought upon a claim for loss or damage, by reason of such release from customs custody or a failure to produce such bill of lading and to entitle any person injured by reason of such release from customs custody to sue on such bond in his own name, without making the collector a party thereto. Any person so injured by such release may sue on such bond to recover any damages so sustained by him; and

(3) The provisions of this subdivision shall not apply in the case of an entry under subdivision (h) or (i) of this section (relating to entry on carrier's certificate and on duplicate bill of lading, respectively).

Signing and Contents

(d) Such entry shall be signed by the consignee, or his agent, and shall set forth such facts in regard to the importation as the Secretary of the Treasury may require for the purpose of assessing duties and to secure a proper examination, inspection, appraisement, and liquidation, and shall be accompained by such invoices, bills of lading, certificates, and documents as are required by law and regulations promulgated thereunder.

Statistical Enumeration

(e) The Secretary of the Treasury, the Secretary of Commerce, and the Chairman of the United States Tariff Commission are authorized and directed to establish from time to time for statistical purposes an enumeration of articles in such detail as in

their judgment may be necessary, comprehending all merchandise imported into the United States, and as a part of the entry there shall be attached thereto or included therein an accurate statement specifying, in terms of such detailed enumeration, the kinds and quantities of all merchandise imported and the value of the total quantity of each kind of article.

Packages Included

(f) If any of the certificates or documents necessary to make entry of any part of merchandise arriving on one vessel or vehicle and consigned to one consignee have not arrived, such part may be entered subsequently, and notation of the packages or cases to be omitted from the original entry shall be made thereon. One or more packages arriving on one vessel or vehicle addressed for delivery to one person and imported in another package containing packages addressed for delivery to other persons may be separately entered, under such rules and regulations as the Secretary of the Treasury may prescribe. All other merchandise arriving on one vessel or vehicle and consigned to one consignee shall be included in one entry, unless the Secretary of the Treasury shall authorize the inclusion of portions of such merchandise in separate entries under such rules and regulations as he may prescribe; except that, in the case of articles not subject to a quantitative or tariff-rate quota, entry for the entire quantity covered by an entry for immediiate transportation made under section 1552 of this title may be accepted at the port of entry designated by the consignee, or his agent, in such entry after the ar-

rival of any part of such quantity at such designated port or at such other place of deposit as may be authorized in accordance with regulations prescribed by the Secretary of the Treasury.

Statement of Cost of Production

(g) Under such regulations as the Secretary of the Treasury may prescribe, the collector or the appraiser may require a verified statement from the manufacturer or producer showing the cost of production of the imported merchandise, when necessary to the appraisement of such merchandise.

Entry on Carrier's Certificate

(h) Any person certified by the carrier bringing the merchandise to the port at which entry is to be made to be the owner or consignee of the merchandise, or an agent of such owner or consignee, may make entry thereof, either in person or by an an authorized agent, in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consignee within the meaning of paragraph (1) of section 1483.

Entry on Duplicate Bill of Lading

(i) Any person may, upon the production of a duplicate bill of lading signed or certified to be genuine by the carrier bringing the merchandise to the port at which entry is to be made, make entry for the merchandise in respect of which such bill of

lading is issued, in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consignee within the meaning of paragraph (1) of section 1483, except that such person shall make such entry in his own name.

Release of Merchandise

(j) Merchandise shall be released from customs custody only to or upon the order of the carrier by whom the merchandise is brought to the port at which entry is made, except that merchandise in a bonded warehouse shall be released from customs custody only to or upon the order of the proprietor of the warehouse. The collector shall return to the person making entry the bill of lading (if any is produced) with a notation thereon to the effect that entry for such merchandise has been made. The collector shall not be liable to any person in respect of the delivery of merchandise released from customs custody in accordance with the provisions of this section. Where a recovery is had in any suit or proceeding against a collector on account of the release of merchandise from customs custody, in the performance of his official duty, and the court certifies that there was probable cause for such release by the collector, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector, but the amount so recovered shall, upon final judgment, be paid out of moneys appropriated from the Treasury for that purpose.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16558

WILLIAM L. BABB,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(February 25, 1958)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

RIVES, Circuit Judge: Appellant was convicted on five counts of an indictment brought under Section 545 of Title 18, United States Code.[1] He was

[1] Reading in part as follows:

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should

sentenced to imprisonment for eighteen months and fined $1500.00. Each count charged that the appellant, on a certain specified date, fraudulently and knowingly concealed and facilitated the transportation and concealment of a certain number of Charolaise cattle, knowing the same to have been theretofore imported and brought into the United States contrary to law. Similar counts of a previous indictment against the appellant had stopped at that point, and appellant's conviction under that indictment was reversed by this Court.

> "We hold that the indictment should have alleged some fact or facts showing that the cattle in question were imported or brought in contrary to some law,' and that it is not enough to say that they were imported or brought in contrary to law.

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have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fradulent invoice, or other document or paper; or

"Whoever fradulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

"Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section."

Title 18, United States Code, §545.

> "[8] As was done in Gillespie v. United States, 2 Cir., 13 F. 2d 736 and Estes v. United States, 8 Cir., 227 F. 818."

Babb v. United States, 5th Cir. 1955, 218 F. 2d. 538, 541.

To meet that holding, each count of the present indictment continued after the words "contrary to law" substantially as follows:

The defendant was a person importing and bringing such merchandise into the United States from a contiguous country, Mexico, otherwise than in a vessel or vehicle and defendant failed to immediately report his arrival to the Customs Officer at the nearest port of entry and failed to present the same to the Custom Officer for inspection, in violation of 19 U.S.C. §1459;

And contrary to law in that:

The defendant was the consignee of the imported merchandise, and failed to make an entry thereof either in person or by an agent authorized in writing under prescribed regulations in violation of 19 U.S.C. §1484.

After the evidence was closed, the district court required the Government to elect whether it would rely for conviction upon §1459 or upon §1484 of Title 19, United States Code, and the Government

elected to rely upon §1484, the pertinent subsection (a) of which, in the months in 1953 during which the cattle were imported, provided in part:

> "* * * the consignee of imported merchandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within forty-eight hours, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time."

Title 19, U.S.C.A. §1484 (a).[2]

* * * * * *

The appellant makes no insistence that he was entitled to a judgment of acquittal on the ground of insufficiency of the evidence to prove that he fraudulently and knowingly concealed and facilitated the transportation of the cattle. Presented by various specifications of error are five principal contentions, thus stated in the appellant's brief:

> "(1) Defendant and appellant contends that the word 'consignee' as used in *19 U.S.C. 1483*, and as used in the relevant counts of the indictment means a person as

[2] An Act of August 8, 1953, c 397, §16 (b), 67 Stat. 509, 517, substituted "five days" for "forty-eight hours."

defined in *19 U.S.C. 1483*,[3] and the defendant under the evidence and theory of the government in this case was merely looking after, guarding, and helping in transporting of the cattle to Louisiana, and that he was not the consignee as used and defined in the statute.

* * * * * *

"(2) Defendant and appellant contends that the provisions of *19 U.S.C. 1484*, requiring a consignee to make an entry either in person or by an agent authorized in writing applies only to goods imported by 'vessel' or 'vehicle' or 'merchandise transported in bond,' and that a 'consignee' of merchandise imported 'otherwise than in a vessel or vehicle' is governed by *19 U.S.C. 1459*,[4] as amended, and there being no evi-

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[3] In pertinent part §1483 reads:

"For the purposes of this subtitle—

"(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor shall be deemed the consignee thereof. * * *."

Title 19, U.S.C.A. §1483 (1).

[4] §1459 reads as follows:

"The master of any vessel of less than five net tons carrying merchandise and the person in charge of any vehicle arriving in the United States from contiguous country, shall immediately report his arrival to the customs officer at the port of entry or customhouse which

dence in this case that the cattle were imported into the United States by 'vessel' or 'vehicle' or 'in bond', there is no evidence that the consignee owed a duty to make an entry of said cattle as provided in *Section 1484*.

* * * * * *

"3. The defendant's position is that there is no penalty prescribed for the failure to make an entry under *19 U.S.C.1484* providing for a consignee to make an entry, and that *19 U.S.C. 1484* is not such a law, 'contrary' to which a prosecution may be supported under *18 U.S.C. 545*.

* * * * * *

"(4) Defendant and appellant contends that the trial court should have dismissed this case, or abated the trial for a reasonable time, until the government paid the

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shall be nearest to the place at which such vessel or vehicle shall cross the boundary line or shall enter the territorial waters of the United States, and if such vessel or vehicle have on board any merchandise, shall produce to such customs officer a manifest as required by law, and no such vessel or vehicle shall proceed further inland nor shall discharge or land any merchandise, passengers, or baggage without receiving a permit therefor from such customs officer. Any person importing or bringing merchandise into the United States from a contiguous country otherwise than in a vessel or vehicle shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which he shall cross the boundary line and shall present such merchandise to such customs officer for inspection." Title 19 U.S.C.A. §1459.

substantial court costs expended by the defendant on his former successful appeal in this case.

* * * * * *

"(5) Defendant and appellant contends that certain errors were committed by the court in the charge to the jury in regard to: (a) the definition of 'wilful' and 'unlawful'; (b) on the issue of knowledge of the provisions of the law as to requirement of an entry; and, (c) accomplice testimony."

1. With certain exceptions not material to this case, 19 U.S.C.A. §1484(a) imposes upon the "consignee" of imported merchandise the duty to make entry therefor.

"* * * In order to prevent frauds on the revenue through collusive transfers, and to save the government the trouble and inconvenience of hunting up the ultimate consignee, it has from the earliest acts been provided that an importation shall, for the purposes of the tariff acts, be deemed and held to be the property of the person to whom the same is consigned, * * ."

25 C.J.S. Customs Duties, §97, p. 254.

Appellant contends that the word "consignee' is limited and defined by 19 U.S.C.A. §1483(1). See Footnote (3), *supra.* We do not agree. Clearly,

that section itself implies that "all merchandise imported into the United States" has a consignee, even though in the usual and ordinary case the consignee is named in the bill of lading. Express provision for cases in which no bill of lading has been issued is contained in 19 U.S.C.A. §1484(c), as follows:

> "(c) The consignee shall produce the bill of lading at the time of making entry, except that—
>
> "(1) If the collector is satisfied that no bill of lading has been issued, the shipping receipt or other evidence satisfactory to the collector may be accepted in lieu thereof * * * "

Recognition of possession as such "other evidence" of the right to make entry is found in Customs Regulations (19 C.F.R. 8.6b) which provides:

> "When merchandise is not imported by common carrier, possession of the merchandise at the time of arrival in the United States shall be deemed sufficient evidence of the right to make entry."

In its charge to the jury, the district court defined "consignee" as follows:

> "You are instructed that by the word 'consignee' as used in this charge and in the indictment is meant a person connected with the unlawful importation, if said importation was unlawful to whom, under

> the contract of shipment or sale, if there was a sale, the merchandise was to be delivered, who knowingly and wilfully received such merchandise, knowing that it had been unlawfully imported and that he owed the duty to make the entry."

Without implying that there was any error in that definition, if such an error did exist it was on the side of the defendant when it imposed on the government the burden of proving that the defendant, as a consignee, was connected with the unlawful importation and received the cattle knowing that he owed the duty to make the entry.

There was substantial evidence that the defendant was the consignee of the cattle. They were imported into the United States from the ranch of one Henry Gilly near Pueblo, Mexico. No invoice, bill of lading, or other papers accompanied the cattle. No entry was made for them at any port of entry. They may have been imported by truck, but more probably they were waded across two hard bottomed crossings of the Rio Grande River near the ranch of the defendant's father. They were delivered to the defendant with instructions to keep and care for them for an indefinite period, "a year or two years, a few days, or what," and then deliver them to a Mr. Broussard. The defendant hauled the cattle by truck, or had them hauled, and delivered them to Broussard at his ranch in Louisiana. Under the testimony, the jury could properly find that the defendant was a "consignee" within the definition given by the court.

2. We think also that the entry required to be made by the consignee by Section 1484 applies to merchandise imported from a contiguous country other than in a vessel or vehicle. The statute imposes a duty to make entry of merchandise upon every consignee thereof, and sets the time for making such entry in the usual case where the merchandise is brought in by vessel or vehicle.[5]

There was no necessity to amend Section 1484 when, in 1938, Sections 1459 and 1460 were amended to make them applicable to persons importing or bringing in merchandise from a contiguous country otherwise than in a vessel or vehicle. All three sections are under Subtitle IV, "Administrative Provisions", of Title 19, "Customs Duties." Sections 1459 and 1460 are under Part II of that Subtitle relating to "Report, Entry and Unlading of Vessels and Vehicles," while Section 1484 is under Part III relating to "Ascertainment, Collection, and Recovery of Duties." The report required by Sections 1459 and 1460 must be made immediately, while the entry required by Section 1484 may be made a considerable time after arrival of the merchandise in this Country. The two requirements are thus cumulative and apply at different stages of the importation.

3. 18 U.S.C. §545 carries its own penalty. See Footnote 1, *supra*. There is nothing to indicate that

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[5] That such has been the interpretation of the Bureau of Customs, see the regulations, 19 C.F.R. 8.3a, stating that, "entry, as required by Section 484(a), Tariff Act of 1930, as amended (19 USC 1484(a), shall be made of every importation whether free or dutiable, and regardless of value * * * "

the term "contrary to law" as used in that section is limited to laws for the violation of which a penalty is imposed.

The appellant relies upon languagge used by this Court in *Goldman v. United States*, 1920, 263 Fed. 340, 343, and upon the opinion of the Eighth Circuit in *Estes v. United States*, 1915, 227 Fed. 818, 821, 822. In neither of those cases was it necessary to decide whether a law not itself carrying a penalty would come within the term "contrary to law" as used in Section 545.

It seems to us that the failure to make entry for the cattle as required by 19 U.S.C.A. 1484(a) was a clear violation of law which comes within the usual and ordinary meaning of the words, "contrary to law." See 9 Words & Phrases, Perm. ed., pp. 359, et seq.; *United States v. Chesbrough*, D.C.N.J. 1910, 176 Fed. 778, 783.

Appellant argues also that the entry, as provided in Section 1484, can be made only after the importation is complete, citing *United States v. Edwin S. Hartwell Lumber Co.*, 7th Cir. 1905, 142 Fed. 432, 436. Considering the purpose of the statute and the evil at which it is aimed, it seems clear to us that the fact that entry is not made until after the arrival of the merchandise in the United States does not keep such entry from being a part of the importation or bringing into the United States within the meaning of 18 U.S.C.A. §545. See *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 442; *United States v. Ches-*

brough, D.C.N.J. 1910, 176 Fed. 778, 781, 782; *State v. Harper*, Texas Civ. App. 1945, 188 S.W. 2d 400, 402; *Sheldon & Co. v. United States*, 1917, 8 Ct. Custom App. 215; Compare *United States v. Lyman*, 26 Fed. Cas. 1024; *Perots v. United States*, 19 Fed. Cas. 258.

4. Of course, the district court did not err in refusing to abate the trial until the Government paid the court costs expended by the defendant on his former successful appeal, for those costs were not taxable against the United States. 28 U.S.C.A. §2412 (a).

5. The court charged the jury as follows:

> "The term 'wilfully' as used in the indictment means the doing of an unlawful act with knowledge that the act is unlawful and with the intent to do the act. An act done through mistake of fact does not come within the meaning of the term 'wilfully' as used herein and in the indictment."

The defendant's objection overruled by the court was as follows:

> "The defendant objects to the charge on the definition of 'wilfully' because the Court treats 'wilful' and 'unlawful' as synonymous. The Court should define 'wilful' as meaning done with intent and deliberately, and 'unlawful' as an act prohibited by law.

> The defendant objects to the Court's charge in this connection because nowhere in the Court's charge does the Court state the acts alleged to be a crime in this case must be unlawfully done, and does not define what is meant by the term 'unlawfully.'"

Obviously, the court did not treat "wilful" and "unlawful" as synonymous. The meaning of "unlawful" is so well understood, that the jury would hardly have been enlightened by defining it "as an act prohibited by law." If the defendant had felt such an instruction necessary, he should have requested it in writing, as required by Rule 30, Federal Rules of Criminal Procedure.

The court instructed the jury as follows:

> "You are further instructed that the intent involved in the offenses charged in the several counts of the indictment in this case are not inherent in the acts themselves, but it is a special intent involving a bad motive, and the specific intent on the part of the defendant to commit the acts charged in counts five through nine of the indictment. In order for you to convict the defendant Babb of the offenses charged in said counts five through nine of the indictment in this case, you must first find beyond a reasonable doubt that he actually wilfully and knowingly was consignee of said merchandise alleged to have been imported in violation of the law, and that he failed to

make entry thereof either in person or by an agent authorized by him in writing under the regulations prescribed by the Secretary of the Treasury, and that he knew that no one else authorized to do so had made such entry. It is not enough that he should have had suspicions or that he should have had reasonable grounds to believe that the entry on said cattle involved in this case was not duly made; but you must find from all of the evidence in this case that the defendant Babb actually knew that no entry had been made either by him or by any other authorized person."

The defendant made the following objection to the charge:

"The defendant objects to the Court's charge with reference to specific intent and knowledge, because the Court requires the jury to find only that the cattle involved in this case were imported into this country in violation of some law, and the Court should require the jury to find that the defendant knew they were brought into this country in violation of some specific law. In addition, the Court should charge that the jury must find that the defendant actually knew the provisions of the specific law contrary to which it is alleged that the cattle were imported. In other words, it should allege that he knew he was supposed

> to make an entry and that he knew he was required to present them for inspection."

For this objection, appellant relies upon *Hargrove v. United States*, 5th Cir. 1933, 67 F. 2d. 820,823, and *Yarborough v. United States*, 4th Cir. 1956, 230 F. 2d. 56, 61. As has been observed, however, in defining "consignee" the court required the Government to prove that the defendant knew "that he owed the duty to make the entry." Other parts of the charge emphasized that requirement. We do not understand that the principle announced in the *Hargrove* and the *Yarborough* cases goes further so as to require actual knowledge of the provisions of a specific law. See 22 C.J.S. Criminal Law, §48; 1 Bishop on Criminal Law, 6th ed., § 297, P. 166, 1 Wharton on Criminal Law, 8th ed., §85a, p. 113; compare *Morissette v. United States*, 342 U.S. 246; 14 Am. Jur. Criminal Law, §24.

The court charged the jury that one of the Government witnesses, Trevino, was an accomplice witness, and that the evidence raised an issue as to whether four other named Government witnesses were accomplice witnesses. The court further charged:

> "You are hereby instructed that if you believe the said witnesses, * * * or either of them, are accomplice witnesses, as that term is defined for you in the Court's charge, or have a reasonable doubt thereof, then you shall take and consider the testimony of such witness or witnesses as you may believe to be accomplices, or have a reasonable

> doubt thereof, with caution. It is not neces sary that their testimony be corroborated, but I charge you that their testimony is to be received with caution by you and you should not accept it unless, in your opinion, it so harmonizes with the other evidence in the case as to leave in your mind no reasonable doubt of its truth.
>
> "I hereby instruct you, that as to the witness Trevino, as I have heretofore stated, he is an accomplice witness and you shall consider the testimony of the said Trevino with caution."

Defendant objected to the charge because it did not include the following: "That said testimony, if said witnesses are found to be accomplice witnesses, should be considered with suspicion and great care and caution."[6]

It is too clear for argument that the charge on accomplice testimony as given was sufficient. *Lyles v. United States*, 5th Cir., No. 16,735, m/s; *Phelps v. United States*, 5th Cir., No. 16,479, m/s.

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[6] In support of this contention, appellant cites: Fletcher v. United States, D.C. Cir. 1946, 158 F. 2d 321; West v. United States, 5th Cir. 1940, 113 F. 2d 68; Lett v. United States, 8th Cir. 1926, 15 F. 2d 686; Egan v. United States, D.C. Cir. 1923, 287 Fed. 958; Freed v. United States, D.C. Cir. 1920, 266 Fed. 1012; State v. Williams, Kansas 1924, 266 S.W. 484; 2 Wharton's Crim. Evidence, 12th ed., §445, p. 223; 1 Underhill's Crim. Evidence, 5th ed., §181, p. 376.

We find no reversible error in the record, and the judgment is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit.

(Seal)

New Orleans, Louisiana.

JUDGMENT.

Extract from the Minutes of February 25, 1958.

WILLIAM L. BABB,

No. 16558.

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

ORDER DENYING REHEARING.

Extract from the Minutes of March 27, 1958.

WILLIAM L. BABB,

No. 16558.

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Record Page No. 635

APPENDIX "C"

(1) Indictment (Fifth Count):

Fifth Count

(18 U. S. C. 545)

That on or about March 19, 1953, in Travis County, Texas, within the Austin Division of the Western District of Texas, WILLIAM L. BABB fraudulently and knowingly concealed and facilitated the transportation and concealment of certain merchandise, to-wit: approximately eight head of Charolaise cattle, knowing the same to have been theretofore imported and brought into the United States contrary to law, in that:

The said WILLIAM L. BABB was a person importing and bringing merchandise, to-wit, approximately eight head of Charolaise cattle into the United States from a contiguous country, to-wit, the Republic of Mexico, otherwise than in a vessel or vehicle and the said WILLIAM L. BABB failed to immediately report his arrival to the Customs Officer at the port of entry nearest to the place at which he crossed the boundary line and the said WILLIAM L. BABB failed to present such merchandise to such Customs Officer for inspection, in violation of 19 U. S. C. 1459; and contrary to law, in that:

The said WILLIAM L. BABB was the consignee of imported merchandise, to-wit, approximately eight head of Charolaise cattle, and failed to make entry therefor either in person or by an agent authorized by him in writing under the regulations

prescribed by the Secretary of the Treasury in violation of 19 U. S. C. 1484.

(Counts Six, Seven, Eight and Nine are identical except as to the number of cattle and the dates of the offenses [Record 9-12].)

(2) Defendant's motion for instructed verdict and overruling of same:

MR. JOHN COFER: As to the fifth, sixth, seventh, eighth, and ninth counts of the indictment, the evidence is insufficient to show that the defendant himself transported or aided and abetted or concealed or facilitated transportation and concealment of any of the cattle involved in said five counts of the indictment. But it is undisputed that said cattle were not concealed or hidden, that they were in charge of the truck driver who was working for Mr. Coble, and that he was responsible entirely for the transportation and that the defendant was doing nothing except going along and guarding the cattle.

As to the fifth, sixth, seventh, eighth, and ninth counts of the indictment there is no evidence to show that the defendant was a person importing and bringing the merchandise involved in said indictment into the United States from the Republic of Mexico, or that he was a person required to present them for inspection, and there is no evidence, and the undisputed evidence shows—there is no evidence that he was, and the undisputed evidence shows that he was not the consignee of the imported merchandise as defined by the statute and that he

was not authorized to make an entry of the cattle involved in said five counts of the indictment.

In order to show that the defendant knew that these cattle had, in the eight counts of the indictment, had been imported in violation of the law, and that the defendant knew that they had so been imported, it is necessary for the Government to prove, first, that they were unlawfully imported, and possession is not sufficient to present a case to the jury of unlawful importation; second, they would have to prove that W. L. Babb, and no other person, imported the merchandise and owed the duty to present the merchandise involved in the nine counts of the indictment for inspection; and, third, that W. L. Babb was a consignee of the imported merchandise and owed the duty to make entry of said cattle in said several counts of the indictment. And the Government cannot make a case without creating a fatal variance by proving that the cattle were imported by any other person other than William L. Babb or by proving that any other person other than William L. Babb was consignee.

In this connection defendant says that it is not contended that it is necessary to prove that he was both an importer and a consignee. Either one or the other or both must be established in order to make a case under the allegations of the indictment. There is no competent evidence that has been offered.

Defendant further moves for instructed verdict because of the failure of the Court to grant a bill of particulars in this case.

THE COURT: Because of what?

MR. JOHN COFER: Because of the failure of the Court to grant a bill of particulars in this case,

and the proof offered in this case is not in conformity with any bill of particulars advising the defendant in advance of whether or not the Government intended to rely upon the fact that he actually imported the cattle, was actually the consignee, or whether or not he was an aider and abettor or an accessory after the fact; and under such circumstances the evidence is insufficient to convict this defendant.

Wherefore defendant prays that the Court instruct the jury to bring in a verdict of not guilty.

Now, I want to say, Your Honor, that we want to renew our motion to strike the testimony of Coble, the man who testified about the transportation there at first because of the undisputed evidence that Babb did not accompany him, that Babb never at any time was in this division or have anything to do with the transportation or alleged concealment, and the evidence is undisputed that Coble was an innocent person in connection with the whole transaction, and that Babb couldn't be an aider and abettor.

THE COURT: Well, as to counts 3 and 4, I want some law.

MR. JOHN COFER: Two, three, and four are just alike.

THE COURT: I said as to two, three, and four.

MR. JOHN COFER: All right, sir.

THE COURT: The rest of the motions I am going to overrule.

MR. JOHN COFER: To which we except.

(3) Renewal of defendant's motion for instructed verdict and overruling of same:

MR. COFER: All right. Now comes the defendant at the close of all the testimony and after the Government closed and after the defendant had closed, and renews his motion for instructed verdict heretofore filed and invokes the ruling of the Court on same, and in addition to the grounds stated therein adds these additional grounds:

The evidence in this case is insufficient to establish knowledge that the cattle involved in the several counts of the indictment in this case were imported in violation of the law, because the Government does not rely in this case upon the statutory presumption or the statutory provision that possession shall be sufficient, unless satisfactorily explained to the jury, to establish the elements of the offense; but the Government relies specifically upon the actual and specific knowledge of the defendant of the illegal *importation*, in that it is alleged in the indictment and the theory of the Government's proof is that the defendant himself was the importer of the cattle, and that he himself illegally imported them, and there could be no application of the statute to circumstances in which the Government relied upon the specific knowledge of the defendant and not upon the statutory inference; and because there is no evidence and, at most, insufficient evidence to establish actual knowledge on the part of the defendant by virtue of the fact that he was an importer as alleged in the indictment or that he was a consignee as alleged in the indictment, and, consequently, there is no evidence that he transported, concealed, or facilitated the transportation and concealment of these cattle knowing that any law had been violated.

There is no evidence to support the allegations in Counts 2 to 9 of the indictment that the defendant William L. Babb had any knowledge that the cattle involved in this case were imported into the United States contrary to any law and, in particular, contrary to the acts set out in the indictment, to-wit, that he was an importer and didn't present the cattle for inspection, and that he was a consignee and did not make an entry. The Government in this case has offered no evidence that the defendant William L. Babb had actual knowledge that the importer had not presented the cattle for inspection or that the consignee had not made an entry of the cattle or that he knew or was familiar with the terms or provisions of any specific law or regulation contrary to which these cattle were brought in by him, if, indeed, they were brought in by him as alleged in the indictment.

The Government by its evidence in this case attempts to show only that the cattle were brought in in violation of some law, and that no entry was made, and that the cattle were not produced for inspection, and offer, at most, evidence that the defendant, as well as other persons associated innocently with the defendant, might have had a suspicion that these cattle were brought in by somebody contrary to some law, or, at most, raise the issue that he might have had grounds to reasonably assume that the cattle were brought in contrary to law. It is essential that the evidence in this case be sufficient to show that the defendant William L. Babb had actual knowledge that the cattle were brought in to this country contrary to law, in that they were not

presented for inspection, and that he did not do so, and in that no entry was made, and that he did not make an entry; and also that he had actual knowledge of the statute or regulations contrary to which they were imported into the United States, and that he had actual knowledge of the terms and conditions of the statute or regulations contrary to which said cattle were imported into the United States.

In this connection, the defendant points out that the statute itself does not delineate the necessary performance and acts which a person importing cattle must undertake in order to present them for inspection, nor the steps and forms which he must follow if he is a consignee and makes the entry, but such steps and acts and forms are prescribed by regulations of the Agricultural Department of the United States, and of the Customs Department of the United States, and such regulations have not been offered in evidence, and the Court does not take judicial knowledge of such particular steps that must be taken.

Wherefore, defendant prays that the Court withdraw the case from the jury, as in his original motion for instructed verdict, and upon the additional grounds as stated herein after the close of all the testimony.

THE COURT: Well, I am still holding in abeyance the motion as to Counts 2, 3, and 4. Other than those objections to those counts, I will overrule your motion. As you know, I requested the District Attorney to present some law on those three counts, and I will hear from him this afternoon in chambers. So I will meet you in chambers, gentlemen, right away.

(4) District Court's charge defining "consignee":

You are instructed that by the word "consignee" as used in this charge and in the indictment is meant a person connected with the unlawful importation, if said importation was unlawful, to whom, under the contract of shipment or sale, if there was a sale, the merchandise was to be delivered, who knowingly and wilfully received such merchandise, knowing that it had been unlawfully imported and that he owed the duty to make the entry.

(5) Defendant's requested charges as to definition of "consignee":

Defendant's Requested Definition No. 1

"You are instructed that by the term "consignee" is meant a person to whom merchandise is delivered who is the seller or the buyer of such merchandise or who has an ownership interest in or to such merchandise, or a person who is named as consignee by a bill of lading, or who is the holder of a bill of lading duly endorsed by the consignee therein named, or who is the consignor if such merchandise is consigned to order."

Defendant's Requested Definition No. 2

"You are instructed that by the term consignee is meant the seller or the buyer, or any person having any ownership interest in or to such merchandise, or any person who is the holder of a bill of lading duly endorsed by the consignee therein named, or, if consigned to order, the consignor."

Defendant's Requested Definition No. 3

"The person to whom the same is consigned and the holder of a bill of lading duly endorsed by the consignee therein or if consigned to order, the consignor shall be deemed the consignee thereof."

(6) District Court's charge on intent:

"You are further instructed that the intent involved in the offense charged in the several counts of the indictment in this case are not inherent in the acts themselves, but it is a specific intent involving a bad motive, and the specific intent on the part of the defendant to commit the acts charged in counts five through nine of the indictment. In order for you to convict the defendant Babb of the offenses charged in said counts five through nine of the indictment in this case, you must first find beyond a reasonable doubt that he actually wilfully and knowingly was consignee of said merchandise alleged to have been imported in violation of the law, and that he failed to make entry thereof either in person or by an agent authorized by him in writing under the regulations prescribed by the Secretary of the Treasury, and that he knew that no one else authorized to do so had made such entry. It is not enough that he should have had suspicions or that he should have had reasonable grounds to believe that the entry on said cattle involved in this case was not duly made; but you must find from all of the evidence in this case that the defendant Babb actually knew that no entry had been made either by him or by any other authorized person."

(7) Defendant's objection to District Court's charge on intent:

"The defendant objects to the Court's charge with reference to specific intent and knowledge, because the Court requires the jury to find only that the cattle involved in this case were imported into this country in violation of some law, and the Court should require the jury to find that the defendant knew they were brought into this country in violation of some specific law. In addition, the Court should charge that the jury must find that the defendant actually knew the provisions of the specific law contrary to which it is alleged that the cattle were imported. In other words, it should allege that he knew he was supposed to make an entry and that he knew he was required to present th[illegible] for inspection."